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October 10, 2014

Ms. Pauline Batarseh, Chief
Policy Implementation Branch
California Department of Toxic Substances Control
1001 "I" Street
P.O. Box 806
Sacramento, California 95812-0806

**Re: Preliminary Response of Bard Manufacturing Company, Inc. to July 3,
2014 Summary of Violations and Request for Extension of Time to Fully
Respond**

Dear Ms. Batarseh:

I write as counsel for and on behalf of Bard Manufacturing Company, Inc. ("Bard") in response to the July 3, 2014 Summary of Violations ("SOV") issued to Bard (identified as Bard Manufacturing Corporation in the SOV) under the Mercury Thermostat Collection Act of 2008 (the "Act"), Cal. Health & Safety Code § 25214.8.12 and Cal. Code of Regulations, § 66274.5. Bard participated in a telephone conference with the Department of Toxic Substances Control ("DTSC") staff and legal counsel concerning the SOV on Thursday, October 2, 2014. At that time, DTSC requested that Bard respond in writing to the SOV on or before October 10, 2014. During the October 2nd telephone conference, Bard suggested that -- because DTSC has not yet completed its meetings with the individual companies that are participating members of Thermostat Recycling Corporation ("TRC") -- it is premature to require Bard and other TRC participating members to respond in full to the SOV by that date. This is particularly true given that TRC's *2013 Annual Report for the California Thermostat Program* ("Report") forms the primary basis for the SOVs, and therefore it is important for Bard and the other member companies to have an adequate opportunity to confer among themselves (and with TRC) to thoughtfully and collectively address the concerns raised by DTSC regarding the Report. In response to Bard's concern in this regard, DTSC indicated that it may consider requests for extension of time to respond to the SOVs. Bard therefore respectfully requests an extension of time through and including November 15, 2014 to respond in writing to the SOV. Notwithstanding that request for extension, Bard offers this letter as a preliminary response to the SOV.

Initially, Bard notes that it has participated in the TRC thermostat recycling and collection program out of a sense of comity and good corporate citizenship, even though Bard is not a "manufacturer" within the meaning of the Act. Section 25214.8.11 defines a

“manufacturer” as “a business concern that owns or owned a name brand of mercury-added thermostats sold in [California] before January 1, 2006.” Bard, however, does not own and never owned a brand of mercury-added thermostats sold in California. Indeed, Bard is an Ohio corporation that was not incorporated until February 3, 2006. As such, Bard did not yet exist as of January 1, 2006, and could not therefore have owned a name brand of mercury-added thermostat that was sold in California before that date. This fact alone establishes that Bard is not a “manufacturer” within the meaning of the Act, and is not therefore bound by the Act to establish and maintain a “collection and recycling program for out-of-service mercury-added thermostats individually or collectively with other manufacturers.” Since April, 2006, Bard is the only company that manufactures Bard brand HVAC products, which products do not include any mercury-added thermostats or switches. Prior to 2006, Bard brand products were manufactured by a separate company, Bard Manufacturing Company, (“BMC”), an Ohio corporation incorporated in 1914, which changed its name to BMC Holdings, Inc. We are unaware of any authority by which Bard could be liable or obligated under the Act for the actions of BMC, a separate and distinct legal entity.

Even if Bard could somehow be considered a “manufacturer” within the meaning of the Act, Bard submits that the Act, and regulations promulgated thereunder, are subject to substantial legal challenge on multiple grounds. That is, the Act and regulations would compel Bard to collect and recycle out-of-service mercury-added thermostats at its own expense, even though such thermostats are not owned by Bard, are not within the custody, possession or control of Bard, and Bard has no control over when such thermostats are removed from service or the manner by which the owner of such thermostat (or person taking the thermostat out of service) disposes of the thermostat. In short, the law imposes a significant burden and expense upon Bard, and exposes Bard to substantial civil liability (including civil penalties and exclusion from sale of thermostats in the California marketplace) if Bard fails to adequately persuade other persons (over whom Bard has no control) to allow Bard to collect and recycle mercury-added thermostats that are under the ownership and control of such other persons.

Beyond exposing Bard to civil liability for the actions or omissions of others, the Act and regulations are legally infirm in other respects. For instance, the Act and regulations (see California Code of Regulations §§ 66274.1 through 66274.8) impose mercury thermostat collection and performance requirements that are based on significantly flawed methodologies or which are arbitrary and capricious, if not unattainable. For instance, based upon a single study, the Act and regulations assume that 217,000 mercury thermostats will be taken out of service in California and become waste in 2013. Some 212,000 thermostats are assumed to be taken out of service in 2014. From those theoretical benchmarks, the Act and regulations arbitrarily impose a “performance requirement” upon Bard and other manufacturers to collect (in the aggregate) 30% of all the mercury thermostats *assumed* to be taken out of service in 2013 and 45% of the thermostats *assumed* to be taken out of service in 2014. The performance requirement escalates through 2017 when manufacturers are required to collect 75% of the mercury thermostats *assumed* to be taken out of service. The performance standard imposed by the act appears to be arbitrary and not based on any legislative findings or study concerning whether the performance standard is remotely achievable. Moreover, the Act and regulations unreasonably compel the manufacturers to “collectively” meet the performance standard although such manufacturers

have little or no control over the collection efforts of one another. Further, the Act and regulations make no distinction between manufacturers who may have commanded a major market share, perhaps distributing millions of mercury-added thermostats, and those manufacturers who were “bit players” in the market, distributing very few thermostats. Disregarding this distinction, the Act and regulations unfairly and unreasonably compel large and small manufacturers alike to meet the same undivided collection rate performance standard.

These are but a few of the arbitrary, unreasonable and perhaps unattainable legal obligations imposed by the Act and regulations. Despite these flaws, which expose the Act and regulations to significant legal challenge, Bard has acted in good faith to comply with the law and intends to continue working with DTSC to ensure that the law meets reasonably achievable objectives for the common good. Toward that end, Bard intends to continue to work with TRC and the other member companies of TRC in the coming weeks in an effort to improve the collection program, consistent with DTSC’s August 25, 2014 *Review of Thermostat Recycling Corporation’s 2013 Annual Report for California* (the “Review”). Although Bard is not currently in a position to specifically address each of the proposed DTSC improvements to the collection program (and which of those improvements will yield cost-effective improvements to the collection program), Bard does intend to engage in a constructive dialogue with TRC and other member companies to improve the collection rate to the extent reasonably possible. Bard understands that one member company of TRC has submitted a detailed response to the DTSC’s Review, which may serve to guide Bard and other companies once that response is shared with Bard and the other group members. We hope to be able to provide additional information in response to the SOV (either collectively with other TRC member companies, or individually on behalf of Bard) by the requested extension date of November 15, 2014.

Thank you for your consideration of Bard’s position in response to the SOV and we look forward to working with DTSC to bring this matter to resolution.

Very truly yours,

A handwritten signature in black ink that reads "Joseph S. Simpson". The signature is written in a cursive, flowing style.

Joseph S. Simpson

JSS/